DATE: March 21, 1995
CASE NO: 90-ERA-0059

IN THE MATTER OF

MARA MCDONALD,

COMPLAINANT,

v.

UNIVERSITY OF MISSOURI,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER

This proceeding arises under the employee protection provision of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1988). [1] Complainant Mara McDonald alleges that she was terminated by the University of Missouri (University) in retaliation for safety related complaints made both internally and to the Nuclear Regulatory Commission (NRC). On November 7, 1991 the Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R.D. and O.) that the complaint be denied. I find that the ALJ erred in recommending dismissal, find for Complainant and remand the case for a determination of damages.

BACKGROUND

Findings of Fact

Complainant McDonald has a PhD from the University of Florida at Gainsville in Zoology. In 1989 she was doing postdoctoral research at the Smithsonian Institute. The research at the Smithsonian was not proceeding as planned so Dr. McDonald contacted Dr. Richard Sage about working with him at the University of Missouri. T. 49-51. Sage agreed to work with and supervise McDonald. Sage immediately started applying for grants to fund their research, in which he specifically requested monies

to pay McDonald as a Postdoctoral Associate. McDonald agreed to move to Missouri and work with Sage in August of 1989, using the funding she was still receiving from the Smithsonian. The

Smithsonian continued to pay McDonald until she was hired by the University. T. 51.

McDonald was first hired by Respondent as an Instructor in Biological Sciences teaching one course from November 1 until December 20, 1989. Next, she was hired on a half time basis for the month of February as a Postdoctoral Associate for Sage. McDonald received another appointment for the period from March 1 through April 30, 1990, on a three-quarter time basis. For the months of May and June, McDonald received full time appointments. (R.D. and O. at 1). McDonald's work as a postdoctoral associate was under a National Institute of Health (NIH) grant. She was hired in advance of the grant in the anticipation and hope that it would be awarded. As finally approved the grant was for three years, subject to annual renewal. The official starting date for the grant was April 1, 1990. (R.D. and O. at 2).

When McDonald arrived at the University she was Sage's only postdoctoral associate, and spent almost all of her time in his lab where she was given an office. McDonald was the senior person in the lab, the only person working for Sage, and Sage looked to her for the proper running and management of the lab. (R.D. and O. at 2). There were also two graduate students, Margaret Ptacek and Nidia Arguedas, working in Sage's lab for other professors. Sage, himself, visited the lab five or ten minutes per day. (R.D. and O. at 2). Anything he saw amiss while he was in the lab he would mention to McDonald and expect that she would see to it that the situation was corrected. T. 295-96. Sage never announced to others working in the lab that McDonald was "in charge" or that they should follow her directions. T. 295-97. (R.D. and O. at 2). The situation was ambiguous, in that Sage acted toward McDonald as if she had the responsibility for the lab, but never informed others that McDonald had the "authority" to manage the activities in the lab. T. 77, 82-83, 87, 295-97, 411. (R.D. and O. at 2). In fact, Ptacek testified that in her opinion, McDonald had no extra authority over safety in the lab. T. 716.

During the week of March 19, 1990, Sage was on a field trip in Texas. While he was away, McDonald noticed Arguedas violating the regulations which govern the handling of radioactive materials. Because Sage was out of town and McDonald could not reach Arguedas' supervising professor, Felix Breden, McDonald went to Dr. John David, the Director of the Division of Biological Sciences and reported the violations. McDonald asked David to bar Arguedas from working in the lab until Sage returned. (R.D. and O. at 2). Arguedas admitted to the

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regulatory violations as alleged by McDonald. T. 107 *et seq.* David did not bar Arguedas from the lab, but obtained her agreement to meet with Jamie Shotts of the Environmental Health and Safety Office in order to learn from him the correct protocols for handling radioactive materials. T. 107-11. This did not satisfy McDonald because she was certain she had previously instructed Arguedas accurately as to what was required, but for some reason Arguedas did not follow through. T. 414, 480, 745. Arguedas admitted that she did not trust what McDonald told her. T. 742.

When Sage returned on March 24, he met with McDonald and she

told him of two safety violations by Arguedas, one involving radioactive sulphur in the unlabeled freezer, and the other involving the storage of dry waste. T. 502. McDonald also informed Sage that, in the past, she and Arguedas had not gotten along, but that their problems had been resolved. This was the first time that Sage had been informed of either safety violations or personality problems in his lab. T. 419-20, 468, 471, 498, 502. On March 26, 1990 Sage asked McDonald for a more detailed explanation of what had transpired, and said he would

think about the problems and possible solutions. T. 124, 470, 471, 512. (R.D. and O. at 3).

The following day, March 27, Sage told McDonald that he accepted Arguedas' agreement to take the training as a good faith attempt to work safely in the lab and that, for the moment he was satisfied. T. 422. On that same day, Sage informed McDonald that NIH had cut her funding by 50 percent, and that he was going to reduce her salary to three quarters time. T. 510. Sage also informed McDonald of his intent to hire an undergraduate, Angela Anders, under a different grant, to work in the lab. T. 548-49. McDonald was upset and responded by demanding that Sage fund her fully before funding other persons. (R.D. and O. at 3). Also, at this March 27 meeting McDonald requested a job description setting out her duties and responsibilities in the lab. T. 406. McDonald requested the job description because she felt that while Sage expected her to be in charge of the lab, the other people in the lab did not respect her role and would not listen to her without direction from Sage. Sage refused to give McDonald such a job description. T. 131-32, 406, 513-15.

On March 28, 1990 Sage left for a meeting in Colorado and was due to return on April 10, 1990. Before Sage left he told McDonald that she was responsible for keeping "peace" in his lab and that if there was not "peace" when he returned he would have to make some "choices." T. 479. (R.D. and O. at 3). Although McDonald was his only postdoctoral assistant, and clearly the senior person working for him in the lab, he had not stated to any of the other persons in the lab that she had any

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[PAGE 4]

administrative responsibility or authority, or that she was responsible for keeping the "peace" while he was away. (R.D. and O. at 3-4). During his absence the situation did not change, personality conflicts continued and, McDonald claimed safety violations continued. (R.D. and O. at 3-4).

On April 11, after Sage returned, McDonald informed him that Arguedas was still doing "shitty work" but made no specific mention of safety problems. T. 470, 504. McDonald claimed there were further safety violations and that was what she meant by "shitty work." McDonald told Sage she had been speaking to various individuals, including personnel in the Dean's Office, about the possibility of a mediator coming in to help resolve some of the problems in the lab. (R.D. and O. at 4). McDonald was hopeful because she and Arguedas had amicably resolved their problems in the past. T. 80. Sage reacted by asking McDonald to leave the lab. T. 140, 552. (R.D. and O. at 4). Sage was a non-tenured professor upset that the rest of the Division was becoming involved in this conflict in his lab. Sage asked McDonald to wrap-up her work in the next couple of months and leave. T. 140.

Sage's action did not immediately change McDonald's status either as his assistant or as an employee of the University. Then on April 16, 1990 the locks were changed on the lab to prevent McDonald from entering and she was told her contract would not be renewed beyond April 30, 1990. (R.D. and O. at 4). However, her contract was renewed twice, for the months of May and June. T. 489-91. The personnel office was not notified before June, 1990 that McDonald's contract would not be renewed

beyond June 30, 1990. (R.D. and O. at 5). On June 28, 1990 Sage told McDonald that she would be finally discharged as of June 30, 1990. T. 164, C-20. On July 1, 1990 McDonald was appointed as Senior Research Laboratory Technician in the Veterinary Diagnostic Laboratory of the University, on a half time basis.

University Grievance Proceedings

McDonald filed a formal grievance with the University on April 25, 1990 before Sage extended her contract until June. The grievance alleged that Sage discharged McDonald in violation of her employment contract. The University then commenced a hearing before the Grievance Committee which concluded on October 30, 1990. On November 8 the Committee sent its report to the Chancellor, Haskell M. Monroe. Chancellor Monroe reviewed the panel recommendation, and sent his recommendation to Peter C. Magrath, the President of the University. Magrath reviewed the findings of the panel, the chancellor's judgment and made the final decision for the University. T. 559. Magrath found that McDonald's discharge was "arbitrary" which was defined by the grievance committee as "conduct which is the product of whim or

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caprice and not the product of any reasoned logic." (Exhibit C-64, 6).

Complaint to the NRC

On May 11, 1990 McDonald wrote a letter to the NRC setting out detailed accounts of the alleged violations in Sage's lab. The formal complaint was sent to the NRC on May 29, 1990. T. 158-61, C-34, R-27. The NRC investigated the allegations and found violations in Sage's lab.

Stipulations

The parties stipulated that the University is a licensee of the NRC and that the use of radioactive materials in Sage's lab was pursuant to that license.

DISCUSSION

Timeliness

An employee who believes that she has been discharged or otherwise discriminated against in violation of 42 U.S.C. § 5851(a) must file a complaint with the Secretary of Labor within 30 days after such discriminatory act. 42 U.S.C. § 5851(b). McDonald filed her complaint with the Secretary of Labor on July 26, 1990. The time period for administrative filings begins running on the date that the employee is given *definite* notice of the challenged employment decision. *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980) (emphasis added). In determining whether or not the complaint is timely, focus is on the time of the alleged *discriminatory act*, not at the point at which the *consequences* of the act become painful." *English v. Whitfield*, 858 F.2d 957, 961 (4th Cir. 1988) (emphasis in original) citing *Chardon v. Fernandez*, 454 U.S. 6, 8, 102 S.Ct. 28, 29, 70 L.Ed.2d 6 (1981) (citing *Ricks*, 449 U.S. at 258, 101 S.Ct. at 504).

On April 11, 1990 McDonald was told to wrap-up her work in the next couple of months. Then on April 16, 1990 McDonald was informed that she would no longer be able to work in Sage's lab and Sage had the locks changed. At this time McDonald was informed that her current contract would not be renewed, and she was being discharged as of April 30, 1990. However, prior to April 30, Sage changed his mind and renewed McDonald's contract for the month of May. Sage again renewed McDonald's contract for the month of June. Though McDonald was no longer working in the lab, her salary was increased from three quarters time to full time.

Complainant correctly notes that "the *Ricks-Chardon* rule is premised on an employee's having been given final and unequivocal notice of an employment decision..." *English v. Whitfield* at 961. In this case Sage did not give McDonald "final and unequivocal" notice of termination until June 28, 1990, which was to become final two days later. Had Sage initially discharged

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McDonald in April, either on the 11th or the 16th, with an effective date of June 30, the 30 day time period would have begun on that day in April, but that is not the case here.

I find that Sage equivocated regarding the final termination decision until June 28, 1990, at which time he did give "final and unequivocal notice" of discharge to McDonald. Therefore McDonald's filing with the Secretary on July 27, 1990 is timely.

Burdens of Proof

Under the burdens of proof and production in "whistleblower" proceedings, Complainant must first make a *prima facie* showing that protected activity motivated Respondent's decision to take an adverse employment action. Respondent may rebut this showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. Complainant must then establish that the reason proffered by Respondent is pretextual. At all times, Complainant has the burden of establishing the real reason for the discharge was discriminatory. *Thomas v. Arizona Public Service Co.*, Case No. 89-ERA-19, Final Dec. and Order, Sept. 17, 1993, slip op. at 20; *St. Mary's Honor Center v. Hicks*, 125 L.Ed. 2d 407, 418-419 (1993).

In order to establish a *prima facie* case, a Complainant must show that: (1) she engaged in protected conduct; (2) the employer was aware of that conduct; and (3) the employer took some adverse action against her. *Carroll v. Bechtel Power Corporation*, Case No. 91-ERA-0046, Sec. Dec., Feb. 14, 1995, slip op. at 9, citing *Dean Darty v. Zack Company of Chicago*, Case No. 82-ERA-2, Sec. Dec., April 25, 1983, slip op. at 7-8. Additionally, the Complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Id. See also McCuistion v. TVA*, Case No. 89-ERA-6, Sec. Dec., Nov. 13, 1991, slip op. at 5-6; *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (6th Cir. 1983).

The record shows that Complainant engaged in several protected activities. McDonald made complaints to both management and the NRC. A complaint or charge concerning quality or safety communicated to management or the NRC is protected under the ERA. *Kansas Gas & Elec. Co. v. Brock,* 780 F.2d 1505, 1510-1513 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986); *Mackowiak v. University Nuclear Systems, Inc.*, at 1162-1163; 10 C.F.R. Part 50 and Appendix B (1990).

Complainant first engaged in protected activity when she informed her supervisor (Sage) and the Division head (David) of the alleged violations by Arguedas regarding the handling of radioactive materials. Internal complaints are a protected activity consistent with the broad remedial purposes of the whistleblower provisions of the ERA. *See Passaic Valley Sewerage*

Comm'rs v. Dept. of Labor, 992 F.2d 474 (3d Cir. 1993); *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989); *Consolidated Edison Co. of N.Y., Inc. v. Donovan*, 673 F.2d 61 (2nd Cir. 1982); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984); *Kansas Gas and Electric Co., v. Brock*, 780 F.2d 1505 (10th Cir. 1985).

Additionally, McDonald engaged in protected activity on May 29, 1990 when she filed a formal complaint with the NRC regarding the alleged violations in Sage's lab. The reporting of possible violations of the NRC regulations is a protected activity. It is not dependent in any way upon the NRC finding actual violations. In this case the NRC substantiated some, but not all, of the violations reported by McDonald. The record supports the conclusion that McDonald engaged in protected

activities in March through May of 1990.

The internal complaints made by McDonald to Sage and to Dr. John David, Director of Biological Sciences, clearly show that Respondent was aware of McDonald's protected activity. McDonald's discharge from the Division of Biological Sciences on June 30, 1990 was an adverse action.

The final element of a *prima facie* case requires Complainant to show that the protected activity led to her discharge. The proximity in time between the protected activity and the adverse employment action is sufficient to raise an inference of causation. *Zessin v. ASAP Express, Inc.*, Case No. 92-STA-33, Sec. Dec. and Ord., January 19, 1993, slip op. at 13; *Bergeron v. Aulenback Transp., Inc.*, 91-STA-38, Sec. Dec. and Ord., June 4, 1992, slip op. at 3. McDonald first engaged in protected activity during the week of March 19, 1990 when she spoke to David regarding Arguedas' NRC violations. On March 24, when Sage returned from a trip, he was informed of the NRC violations. Sage made the initial decision to discharge McDonald less than three weeks later on April 11, and he was out of town for two of those intervening weeks. McDonald was finally discharged less than one month after she filed a formal complaint with the NRC. I find that the proximity between McDonald's complaints and her discharge is so close in time as to create an inference that the adverse action was taken because of the protected activity.

Further evidence that McDonald's protected activity led to her discharge comes through the direct testimony of David, Sage and Kathy Newton. David testified that ERA complaints were part of the reason for McDonald's discharge. David stated that it was not the ERA complaints themselves that led to the discharge, but rather the way McDonald handled the complaints. T. 648-49. Sage also admitted that McDonald's safety concerns played a role in the disruption in the laboratory. T. 552-53. Dr. Kathy Newton testified that she knew of problems in Sage's lab before McDonald

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even arrived in Missouri. T. 621.

Furthermore, less than one month before McDonald reported NRC violations to anyone, Sage wrote a letter of recommendation for McDonald. In Sage's February, 1990 letter he praised McDonald's work habits and her ability to get along with others. T. 421-22, Ex. C-73. It is not credible that one month McDonald got along well with others and the next month she was suddenly responsible for disrupting the whole lab.

Since McDonald has presented a *prima facie* case of discrimination, the burden is then upon Respondent to articulate legitimate, non-discriminatory reasons for Complainant's discharge. *Darty*, slip op. at 8. Respondent denies that McDonald's discharge was based upon her protected activity and attempts to articulate other reasons for her discharge. However, prior to any hearings under the ERA, Respondent itself found that McDonald's discharge was "arbitrary" and not based upon any "reasoned logic." (Exhibit C-64, 6). In other words, there was no good reason for her discharge according to Respondent's own internal grievance committee finding. Though the conclusion of the grievance committee is not binding,

it is certainly persuasive.

In the ERA proceedings Respondent claims McDonald was discharged because she caused personality conflicts in the lab. This is Respondent's alleged "legitimate, non-discriminatory reason" for discharging McDonald. Respondent argues that the problems between McDonald and Arguedas affected everyone in the lab and caused the lab to become completely unproductive. I have held "that even when an employee has engaged in protected activities, employers may legitimately discharge for insubordinate behavior, work refusal, and disruption." *Sprague v. American Nuclear Resources, Inc.*, Case No. 92-ERA-37, Dec. and Order, December 1, 1994, slip op. at 8. *See also, Dunham v. Brock,* 794 F.2d 1037, 1041 (5th Cir. 1986); *Abu-Hjeli v. Potomac Elec. Power Co.*, Case No. 89-WPC-01, Final Dec. and Order, Sept. 24, 1993, slip op. at 15-18; *Couty v. Arkansas Power & Light Co.*, Case No. 87-ERA-10, Final Dec. and Order on Remand, Feb. 13, 1992, slip op. at 2; *Hale v. Baldwin Associates*, Case No. 85-ERA-37, Final Dec. and Order, Oct. 20, 1986, slip op. at 26.

In this case, like in *Sprague*, Respondent is arguing that it was the manner in which McDonald made her complaints, not the complaints themselves that led to her discharge. However McDonald, like *Sprague*, never refused work or attempted to disrupt others in their work, except where the actual violations were at issue. McDonald admits she asked Arguedas to be barred from the lab for violating the NRC regulations. Such a request does not deny McDonald protection under the ERA just because it

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led to tension in the lab between McDonald and Arguedas. I find Complainant's alleged misconduct was "nothing more than the result and manifestation of [her] protected activity," which does not remove McDonald from statutory protection. *Sprague citing Dodd v. Polysar Latex*, Case No. 88-SWD-00004, Dec. and Order, Oct. 6, 1994, slip op. at 15-17.

After McDonald complained of the regulatory violations, there was definitely tension in the lab between McDonald and Arguedas. However, Sage quickly assigned the blame to McDonald without ever investigating if the personality conflicts could be resolved or if she was the one truly to blame. McDonald and Arguedas had a previous conflict which had been resolved amicably. Mediation was an option, but Sage never considered it. McDonald was the one complaining, therefore McDonald was the one discharged. David claimed that it was the way McDonald handled the violations that led to her discharge, not the actual complaints. I do not believe such a distinction can be made in this case. Based upon the evidence as a whole, Complainant has proven that her protected activity led to her discharge.

CONCLUSION

For the forgoing reasons, I find that McDonald was discharged in violation of the ERA. The recommended decision of the ALJ is therefore rejected and the case is remanded for further proceedings to determine damages, costs and expenses.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The Amendments to the ERA in the National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992), do not apply to this case because the complaint was filed prior to the effective date of the Act. For simplicity's sake I will continue to refer to the provision as codified in 1988.